No. 280

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

HARRY KORTZ, PETITIONER,

vs.

THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA,
A CORPORATION, RESPONDENT.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

LOWELL WHITE,
Denver, Colorado,
Counsel for Respondent.

PEERLESS PRINTING COMPANY, DENVER

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The petition for a writ of certorari and the supporting brief have not made the required showing for the issuance of such a writ. The brief treats the present proceeding as an ordinary writ of error or appeal. But, on that basis the petitioner has failed to show that his rights have been wrongfully invaded by either the District Court of the United States or the Circuit Court of Appeals.

HISTORY OF THE PROCEEDINGS.

In June, 1938, this petitioner commenced an action against this respondent in a District Court of the State of Colorado, claiming and seeking disability benefits provided for in the policy involved in this action. At the trial there was a sharp conflict in the medical evidence. However, some of the evidence showed that there was a tendency towards improvement. At the request of peti-

tioner, the jury was instructed that it could find a verdict for the petitioner if it found him totally and continuously disabled for not less than three consecutive months. The jury awarded petitioner disability benefits to March 21, 1939. The case was taken to the Supreme Court of the State of Colorado and that Court held there was sufficient evidence to sustain the verdict. At no time during the proceedings in the trial court or the Colorado Supreme Court was there any effort made to adjudicate whether or not this petitioner would be disabled in the future.

In the present case, none of the pleadings filed by petitioner alleged that he was entitled to judgment under the theory of res adjudicata or estoppel by judgment. Nor did he allege that the previous trial settled or adjudicated the question of his disability since March 21, 1939. At no time prior to or during the trial, did petitioner move for judgment because of the judgment in the previous case. He never claimed that the issue of total and permanent disability involved in this case was settled or adjudicated by the first case. Nor did the petitioner move or suggest that respondent had the affirmative of the issue in this case, and that it should be required to assume the burden of proving that petitioner had recovered from the ailments and disability existing at the time of the first trial. The only motion made by petitioner during trial was a perfunctory motion for a directed verdict. In other words, the plaintiff at all times recognized that he had the affirmative of the issue of whether he was totally disabled during the period involved in this action. Without applying for any ruling of court he voluntarily assumed the burden of proving his disability and with alacrity he opened and closed the case.

As a part of his proof in this case he offered the pleadings, verdict, and judgment in the first case. At the time of trial, the only effect petitioner claimed for that evidence was that it raised a rebuttable presumption or inference of fact that his disability continued and that the burden of going forward with evidence to rebut that inference, shifted to the respondent.

At the end of the evidence the petitioner's motion for directed verdict (262) followed the same theory adopted by the plaintiff and followed by the trial court throughout. The only ground for the motion was the claim that the respondent had not gone forward with such evidence and it had not proved that the disability had been removed and that it had been established beyond question that plaintiff's condition had progressed substantially. That motion raised a question of fact, only, and was overruled.

During the time for tendering and discussing the instructions the petitioner made no motion or suggestion that he was entitled to judgment because of the previous judgment. Nor did he request that any of the thoughts which he now raises be embraced in any instruction. He insisted that the court instruct the jury that the fact that the first case had found petitioner to have been totally disabled created a presumption of fact that said disability continued and, because of that inference of fact, the respondent was required to go forward with the evidence to overcome and rebut that presumption. Such instruction was given as requested, and naturally was not objected to by the petitioner. There was then submitted to the jury the questions whether or not the respondent's evidence was sufficient to overcome and rebut the presumption that petitioner's disability continued during the period involved in this action, and, whether or not he was totally disabled during this period. Upon the conflicting evidence, the jury determined those questions against the petitioner in favor of the respondent.

The petitioner filed a lengthy motion for judgment, notwithstanding the verdict, and in the alternative for a new trial (42). However, he did not contend that the court erred in not requiring the respondent to assume the burden of proof, nor was there any claim that the petitioner is entitled to judgment under the doctrine of res adjudicata or estoppel by judgment.

The arguments presented to the court are unsound and of no consequence even if considered on their merits,

but it may save time if this court realizes that throughout the trial of this case, the theory of the petitioner was followed by the court. The questions now argued were never raised or presented to the court in any manner before the close of the trial. Under the Rules of Civil Procedure and by long established practice, those matters can not now be assigned as error or considered by an Appellate Court.

If this were an ordinary appeal or writ of error, the petitioner has failed to show any grounds for the reversal of the judgment of the trial court and the decision of the Circuit Court of Appeals, and certainly he has shown no reason why a writ of certiorari should be granted.

ACTION ON A CONTRACT.

The present action is one based on a written contract between the parties. It provides that petitioner is entitled to benefits in the event he becomes totally and permanently disabled, *or* if his total disability continues for at least three months. The contract provides:

> "* * * the disability * * (is) presumed to be permanent if it is present and has been in existence continuously for no less than three consecutive months. * * * (11).

Of such a clause the Colorado Supreme Court in the case of *Clark v. Equitable Life Assurance Society,* 100 Colo. 490, 68 Pac. (2nd) 541, said:

> "Her *permanent* disability is a fiction elevated to the dignity of fact by contract. * * *" (Court's italics.)

The fiction which permits a plaintiff to recover for temporary total disability does not make that disability permanent in fact. The contract also states:

> "The Company will begin to pay * * * from the date of the receipt by the Company of satisfactory proof of total and permanent disability of Insured *or* of the Insured's continuous total disability for three consecutive months." (12).

If an assured is permitted to recover because he has been totally disabled for more than three months, but his disability is temporary in character, no presumption of continuance should flow from such an award.

In the trial of this case petitioner introduced into evidence the pleadings, verdict and judgment. The trial court suggested that plaintiff introduce the instructions to show what question had been submitted to the jury (64, 65). None of the instructions was tendered. If they had been introduced they would have shown that the jury in the first case was instructed that petitioner might recover if he were found to have been disabled not less than three consecutive months. In other words, he was allowed to recover from total, temporary disability. That being so, there is no basis for the claim that there was a jury finding or a judicial determination that the petitioner was totally and permanently disabled.

Every purported assignment of error or argument appearing in the petition and supporting brief assumes and states that petitioner had been adjudicated totally and permanently disabled. His verdict and judgment were based upon a fiction of permanence, or a finding of temporary, total disability. The issue submitted to the jury in the first case is not in the record. Therefore, there is nothing for the Court to consider. There is nothing to show that he was found to be actually permanently disabled.

Petitioner's proof consists of his complaint alleging he is permanently disabled, and the general verdict of the jury. This cannot be said to be a finding of permanent disability in view of the contract which provides the same benefits for continuous, total disability as for actual permanent disability. Thus, the foundation and base of each of petitioner's present contentions are washed away, and there is nothing left to consider.

WAR RISK CASES ARE NOT APPLICABLE.

The petitioner relies upon the war risk cases. It is not necessary to discuss the soundness of the cases cited,

since they are fundamentally distinguishable from the case at bar. War risk cases are based on Treasury Regulations and Procedure of the U. S. Veterans Bureau, Page 9, which says that a plaintiff is not entitled to recover unless the disability is founded upon conditions which render it reasonably certain they will continue throughout life.

The 7th Circuit Court of Appeals in *Countee vs. U. S.*, 127 Fed. (2d) 761, 142 A. L. R. 1155 appears to argue against the soundness of its former decision that the burden is on the government to show recovery of the ability to continuously follow a gainful occupation. Nevertheless, its sole justification for such a holding is because:

> "A finding in the original case of the plaintiff's total and permanent disability carried with it the *legal implication that such condition was reasonably certain to continue throughout life.*" (Italics ours.)

As previously shown there is no evidence of a comparable finding or basis for the verdict in the first Kortz case.

PETITIONER HAD THE BURDEN OF PROVING HIS CASE.

All petitioner's claims are directly answered in the well-reasoned, leading case of *U. S. F. & G. v. McCarthy*, 33 F. (2) 7, which is directly in point. In 1924 plaintiff brought a suit to recover the accrued disability payments and judgment was rendered in his favor for the period of December 6, 1923, to October 22, 1925. The company paid that judgment. The case reported covers the period from October 22, 1925, to February 23, 1928. Plaintiff's pleaded the proceedings in the former action to "prevent a re-litigation of all the issues tried in that suit." Plaintiff's theory was that every fact essential to recovery had been introduced to warrant a finding of improvement in his condition since the previous adjudication. The court said:

> "The question litigated was continuous total disability during the period for which recovery was sought. The period of time covered in this

case was then in the future. As the burden there was upon appellee to show continuous total disability for the period involved, the same burden rests upon him to show such continuous total disability for the period here involved, and the right under the terms of the policy is in the appellant to contest the question of such total disability for every period of time provided by the terms of the policy.

"* * * It is apparent that it was not the intention of the parties to the contract that total disability established for one period should establish the same for a subsequent period.

"If the appellee had introduced the record in the former case and rested, and appellant had introduced no evidence, certainly a court could not have told the jury that there was a presumption therefrom that the total disability there found would continue to exist over the period in suit."

"Disability is not entirely a physical matter. Will power and condition of mind enter into it. A person may be disabled today, and in a year from now, without any change in the physical condition, not be disabled.

* * *

"That his hand remains in the same condition is not conclusive that his disability also continues. Indemnity under the policy was for disability—not for injury to the hand.

* * *

"We are satisfied that the claimed estoppel by judgment is not sufficient to establish total disability for the period of time covered by this action. The ultimate fact in the previous suit as to disability was total disability during the period for which indemnity was sought. The ultimate fact here is total disability for an entirely separate and definite period of time. That question was not in issue, and could not have been litigated

in the former action. Each case stands upon its own bottom."

Regardless of whether or not the issue in the first case was continuous, total disability or total and permanent disability, for the purposes of this argument let us assume that during the period involved in the first action petitioner was found to have been not only totally, but permanently, disabled. Even under such circumstances no reason has been shown why this petition should be granted.

The contract between the parties makes it plain that the petitioner would not be entitled to disability benefits except during disability. In the first place, payments are to be commenced when the disability has been proved. Secondly, such payments will be "made" * * * during * * * the continuance of such disability." After such total and permanent disability has been proved and payments made, the parties agree that " * * * if it shall appear to the company * * * that the insured is able to perform any work or follow any occupation whatsoever for remuneration or profit, no further premiums shall be waived, and no further income payments shall be made." In view of such a contract, any claim that the first trial was res adjudicata of the second, or that by reason of the first, the defendant is estopped to defend the second, or that there is a conclusive legal presumption that petitioner continues to be disabled is all a matter of grasping at straws after a case has been submitted and tried upon the petitioner's own theory and then lost.

PETITIONER'S POINTS.

Apparently petitioner, in his point or argument No. 1, claims that he is entitled to judgment under the doctrine of res adjudicata or estoppel by judgment. They are not the same, but since neither applies the following should suffice.

a. In order for res adjudicata to be applicable it must be shown that the subject matter of the two cases is identical, and that the evidence of one case would prove the issues in the other. *Pomponio vs. Larsen,* 80 Colo. 318; 251 Pac.

534. In the two Kortz cases the first involved disability from 1937 to 1939, and the second one from 1939 to 1943. That certainly is a difference in the subject matter. Evidence which was competent and relevant in one case would not prove the issue in the other.

b. Estoppel by judgment is not available except when an issue in the second case was actually presented and decided in another case. The issue here, was plaintiff totally disabled from March, 1939 to 1943? That issue could not and was not presented, and was not decided in the first case.

c. Apparently petitioner claims that his first case was decisive of the second because he was there found to be permanently disabled. There is nothing in the present case to show that the question of permanent disability was submitted to the jury, and, as a matter of fact, as previously shown, only the question of continuous disability was presented to the jury in the first case.

d. To be available, petitioner must have pleaded a claim which showed that he was entitled to relief under the theory of res adjudicata, or estoppel by judgment. This was not done.

e. There was no pleading of res adjudicata or estoppel by judgment in any of petitioner's three complaints. The ultimate fact alleged in each of petitioner's three complaints was that he was totally disabled during a certain period. An answer, the same as the one filed, could have been filed to each of the complaints before anything was stricken therefrom. The net result or the issue thereby formed would have been exactly the same as that under which the case was tried, i.e., petitioner alleged he was totally disabled during a certain period, and defendant denied that claim. The petitioner had the affirmative of that issue.

f. (1.) Assume that the Court erred in striking parts of the three complaints. Each of those errors was cured, in that everything which was stricken was introduced into evidence.

(2.) Again suppose, that the complaint constituted a plea of res adjudicata or estoppel by judgment. Plaintiff had everything in evidence which had been stricken from each complaint, but he made no motion for judgment on the grounds of res adjudicata, estoppel by judgment, nor did he otherwise make known to the Court the action which he desired, namely, judgment because of the previous adjudication.

(3.) The trial court cannot be charged with error in not giving him judgment which he did not request, or in overruling a motion (Rule 50) which was never made, or in refusing an instruction which was never tendered (Rule 51, Rules of Civil Procedure).

In petitioner's Point No. 2 he says he had a right to stand upon the prior adjudication of his total and permanent disability. We have previously shown that there was no such adjudication. Further, even if he had been adjudicated totally and permanently disabled, that would not prove that he was totally and permanently disabled during the period involved in this action, and there is nothing in the case of *Countee v. U. S., supra,* to support such a contention.

In Point No. 3 of the summary of the argument petitioner refers to a presumption of law. He previously used this term in No. 1 assignment of error, and it would appear that he is using it as synonymous with res adjudicata. If so, that has been previously covered. At time of trial he claimed a right to nothing but a so-called presumption or inference of fact of the continuance of total and permanent disability. And, in conformity with that contention, the court gave such an instruction as requested by petitioner (267).

In Point No. 4 petitioner seeks to have this Court pass upon questions of fact.

Doctors Darley and Packard testified that the petitioner's arthritis had reached the quiescence stage, that he was not suffering from a lack of circulation of the heart,

that there was nothing disabling him, and that petitioner could perform all the duties he previously performed, and the performance of that work would do him good (217, 219, 220, 188, 189, 190).

Although there is no burden upon respondent to prove a recovery, such evidence is proof of recovery if the jury believed it, and the jury did believe the evidence. The issue of disability during the period here involved was fully and finally determined by the proper trier of the facts, after a trial of the case following the petitioner's theory and under instructions submitted and requested by petitioner.

With regard to Point No. 5 it seems unnecessary to elaborate upon this illusory point, and sufficient statement of it appears in the opinion of the Circuit Court of Appeals.

CONCLUSION.

Petitioner never pleaded or attempted to plead more than a mere recital of the happenings in the first case, and then he was allowed to put everything in evidence with regard to the first case which he offered. At no time did he claim that the first case was an adjudication of the second. He opened and closed the case, voluntarily assumed the burden of proving his disability, and his theory of the case was followed throughout by the trial court. He was denied nothing except his motion for directed verdict, the reasons for which were obviously questions of fact.

The result achieved by the jury is a just one, after a fair trial, and there is nothing in the opinion of the Circuit Court of Appeals which is in conflict with the decisions of other courts of appeals. There is nothing to justify the petition.

Respectfully submitted,

LOWELL WHITE,

Counsel for Respondent.